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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CLIFFORD HENRY BOWEN,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JACK B. ZIMMERMANN
LAW OFFICES OF
JACK B. ZIMMERMANN
(On Appeal Only)

Five Post Oak Park, Suite 1130
Houston, Texas 77027
Tele: (713) 552-0300

Attorneys for Petitioner,
Clifford Henry Bowen

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED

1. Whether the Petitioner was denied due process of law because exculpatory evidence within the possession and knowledge of the State was withheld from the defense.

2. Whether the Petitioner was denied due process of law because he did not receive reasonably effective assistance of counsel at both stages of his capital murder trial.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

The Petitioner, Clifford Henry Bowen, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Oklahoma entered in this proceeding on November 30, 1984.

CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals of the State of Oklahoma in this case is cited as *Bowen v. Oklahoma*, No. F-81-315 (Okl. Cr. Nov. 30, 1984), and the opinion appears in Appendix A hereto.

JURISDICTION

The judgment of the Court of Criminal Appeals of the State of Oklahoma was entered on November 30, 1984. A timely Motion for Rehearing on Behalf of the Appellant was denied on March 8, 1985, and this Petition for Certiorari was filed within sixty (60) days of that date, in accordance with Rule 20.1 of the Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

As provided by Supreme Court Rule 21.1(f), the verbatim quotation of the following Amendments to the United States Constitution is set forth below:

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and

to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner was convicted on March 13, 1981 by a jury in the District Court of Oklahoma County, Oklahoma, case number CRF-80-3397, of three counts of the offense of Murder in the First Degree, 21 O.S. 1980 § 701.7. His punishment was fixed by the jury at death in each count. A Motion for New Trial was filed in the District Court on April 9, 1981, and an Amendment to Motion for New Trial was filed on April 29, 1981. The Motion for New Trial was overruled by the District Court on May 7, 1981, and judgment and sentence were imposed on that date.

No appeal bond was set by the District Court, and the Petitioner is currently in the custody of the Oklahoma Department of Corrections.

On February 24, 1982, the Petitioner filed his Appellate Brief with the Court of Criminal Appeals of the

State of Oklahoma, (No. F-81-315), and on the 27th day of April, 1983, the case was orally argued before two of the three judges.

On April 27, 1983, the Petitioner filed his Second Motion for New Trial, and the Court of Criminal Appeals remanded the case to the trial court to determine if an evidentiary hearing was appropriate. The trial court ordered such hearing, and it was held before the Honorable Raymond Naifeh on September 29 and 30, 1983. The trial court submitted Findings of Fact and Conclusions of Law on October 26, 1983, and the Petitioner filed his Supplemental Appellate Brief in the Court of Criminal Appeals on December 19, 1983.

At trial, twelve witnesses testified that the Petitioner was at a special holiday rodeo in Tyler, Texas until about midnight on the night of July 5, 1980. Johnny Wheeler testified that he was at the rodeo with the Petitioner, and called the Petitioner at home and spoke to him on the telephone after 1:00 a.m. on July 6, 1980. (Tr. 467-531).

Three men were shot with a .45 caliber pistol at about 2:00 a.m. on July 6, 1980 at the Guest House Inn in Oklahoma City, Oklahoma. (Tr. 208). No witness could identify the shooter. The State's case relied on two witnesses who identified the Petitioner as the individual who was near the scene shortly prior to the shootings. Mary Chilton, a clerk at the motel, said she observed a man at about 12:15 a.m. standing near the concession area, who remained for about the next two hours. (Tr. 290-292). He had salt and pepper hair, was wearing a red baseball cap, a medium blue long-sleeve shirt, blue jeans, and a pair of work boots. (Tr. 293). He did not wear

glasses, and his face was almost a white, whitish gray (Tr. 317). She did not see the shooting. Carrie Pitchford, a motel guest, said she returned to her room about 1:15 a.m. to 1:30 a.m., and looked out her window to see a large man near the concession area wearing a very white t-shirt, bright red cap and jeans. (Tr. 334-335). His face was very, very white. She identified this man as the Petitioner. (Tr. 335). She did not see the shooting. The manager of the motel said he saw a man with a red ball cap near the candy machine shortly after midnight, but could not describe him. (Tr. 359). Later, he saw someone with a red cap shooting, but could not describe the man or his clothes. (Tr. 360-361).

The State introduced rebuttal testimony that a small executive jet could fly from Tyler, Texas to Oklahoma City, Oklahoma in thirty to thirty-five minutes, and could land at a downtown airstrip, thirteen minutes by car from the motel. (Tr. 577-584). No evidence was introduced that any such flight occurred on July 5 or 6, 1980. At the hearing on the first Motion for New Trial, two expert witnesses testified that it was an absolute impossibility for a jet airplane to fly from Tyler to the downtown Oklahoma City airpark due to the length of the airstrip, its location, airplane characteristics, and safety considerations. (Tr. 815-819). This was confirmed by the manager of the airpark, who testified that he was unaware of any night landing by a jet at his unlighted, non-controlled airfield in the thirty-three years he had been there. (Tr. 831).

On appeal, the Petitioner submitted seventeen propositions of error, and, in his Supplemental Brief, submitted two supplemental propositions of error. Those issues

pertinent to this Petition for Writ of Certiorari are the following:

Based on the foregoing factual background, the Petitioner contended in his Second Motion for New Trial and on appeal that federal constitutional error occurred when exculpatory evidence was withheld regarding a suspect named Lee Crowe who matched the description given by the scene witnesses, who had a motive to kill the primary victim, and who had come to Oklahoma from South Carolina just before the killings. The facts are set out in greater detail under Reason for Granting Certiorari Number One, *infra*. The Oklahoma Court of Criminal Appeals denied relief, holding that all other suspects had been eliminated by the police, and, in the absence of a pre-trial motion to produce exculpatory evidence, the State had no duty to advise the defense of the suspect Crowe. *Bowen v. State, supra,* at 6.

In his Amendment to Motion for New Trial and on appeal, the Petitioner contended that federal constitutional error occurred when he was denied effective assistance of counsel at both stages of his capital murder trial. In his appellate brief, the Petitioner set out ten separate acts or omissions at the guilt or innocence stage which he contended were not characteristic of the reasonable skill and diligence of a reasonably competent defense lawyer defending a capital case, and set out two major omissions occurring during the sentencing phase. As to the latter proceeding, the Petitioner contended he had no advocate at all, because trial defense counsel put on no evidence, and made no final argument whatsoever. The acts and omissions are described in more detail under Reason for Granting Certiorari Number Two, *infra*. The Petitioner contended he was harmed at the guilt or inno-

cence stage by the ineffective assistance of counsel because he was in Tyler, Texas when the killings occurred, but was convicted of three murders in Oklahoma. He contended he was harmed by having no lawyer at the sentencing hearing because he was assessed three sentences to death.

The Oklahoma Court of Criminal Appeals never addressed a single specified act or omission alleged, merely stating that the Petitioner had failed to demonstrate that there is a reasonable probability that, absent the "alleged errors," the verdict would have been altered, or that his punishment would have been lessened. Further, the Oklahoma Court of Criminal Appeals held that there was "no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversarial process caused by deficiencies in counsel's assistance." *Id.* at 9.

On November 30, 1984, the Court of Criminal Appeals affirmed the convictions and sentences of death. Petitioner's Motion For Rehearing was denied on March 8, 1985. On March 15, 1985, the Court of Criminal Appeals set the date of June 17, 1985, for the execution of the Petitioner.

The opinion and two orders of the Court of Criminal Appeals are attached as Appendices A, B, and C, respectively.

REASONS FOR GRANTING CERTIORARI

I. THE PETITIONER WAS DENIED DUE PROCESS OF LAW IN THAT EXCULPATORY EVIDENCE WITHIN THE POSSESSION AND KNOWLEDGE OF THE STATE WAS WITHHELD FROM THE DEFENSE.

A. THE EVIDENCE WITHHELD BY THE STATE:

In July, 1980, in connection with the investigation of the shootings in question, two detectives with the Oklahoma City police department went to Madill, Oklahoma to interview Mrs. Margraves, the mother of Raymond Peters, one of the victims. (Tr. 126).[1] Mrs. Margraves informed the detectives that Patsy, one of Raymond's ex-wives, had been in the Madill area at about the time of the murders. (Tr. 127). Patsy had had a man with her, and Mrs. Margraves was suspicious of the man because Patsy would not introduce him to anyone. (Tr. 127-8). Mrs. Margraves described the man as 6′ 2″, 225 pounds, salt and pepper hair, and wearing some type of cap. This fit the description of the person given by the scene witnesses. (Tr. 128).

The detectives then went to a farm between Russett and Mannsville, Oklahoma. There, they interviewed Jimmy Forguson, brother of Patsy Peters, and Margie Forguson, mother of Patsy Peters. (Tr. 128). The detectives learned that the man with Patsy was Lee Crowe. (Tr. 129). According to Mrs. Forguson, she and Patsy went to a

1. All references to the record under this Reason for Granting Certiorari are to the transcript from the Hearing on the Petitioner's Second Motion for New Trial.

revival meeting in Oklahoma City on the night of the killings. (Tr. 166, 274). Mrs. Forguson believed that Lee Crowe was at home with her husband that night. (Tr. 166). However, no one talked to Mr. Forguson in an effort to confirm this until the summer of 1983. (Tr. 167). To this date, no one has stated under oath that he was with Crowe on that night (Tr. 170).

Shortly after interviewing these witnesses, the detectives learned that Lee Crowe had applied to be a police officer in Irving, Texas. The detectives traveled to Irving and obtained a photograph of Lee Crowe. (Tr. 282). Detective Horn believes that this trip occurred on July 23, 1980. (Tr. 282).

On July 24, the Oklahoma detectives contacted South Carolina authorities for the purpose of obtaining more information about Lee Crowe. (Tr. 16). The Oklahoma detectives described the suspect to South Carolina authorities as 6′ 3″, 230 pounds, salt and pepper hair, beer gut, jeans, and wearing a baseball hat. (Tr. 18). When the description was completed, the South Carolina authorities immediately identified the suspect as Lee Crowe. (Tr. 269). The South Carolina authorities also confirmed that Crowe had been living with Patsy Peters (Tr. 21, 219), was in his late thirties, (the same age as the suspect) (Tr. 20), commonly used a .45 caliber weapon, (the type of weapon used in the killings) (Tr. 19), commonly used very expensive silver-tipped bullets used in the killings (Tr. 49, 252), and had traveled to Oklahoma shortly before the killings. (Tr. 23). South Carolina authorities provided a picture and fingerprint card for Lee Crowe. (Tr. 17). They later mailed shell casings from Crowe's gun. (Tr. 29).

On about the same day, a photo spread was shown to Mary Chilton, one of the scene witnesses. (Tr. 133). The witness picked the Petitioner, not Crowe, out of the photo spread. (Tr. 133). However, the photograph used in the photo spread showed Crowe with a moustache. (Tr. 157). The man at the scene had had no moustache. (Tr. 291). The Oklahoma detectives were aware that Lee Crowe had shaved his moustache at approximately the time of the killings. (Tr. 297). The witness picked the Petitioner out of the line-up despite the earlier description of the man at the scene as in his late thirties. (Tr. 158). Furthermore, contrary to the earlier description, the Petitioner's face does not appear white in the photo spread. (Tr. 159). Crowe definitely appears more pale than the Appellant in the photo spread. (Tr. 160). The same photo spread was sent to California and viewed by Mrs. Pitchford, the other scene witness. (Tr. 135). She also picked the Petitioner out of the same spread. (SX-3). Despite the witness' identification of the Petitioner, the detectives caused the warrant for the murders to be issued in the name of John Doe. (Tr. 156).

On July 28, 1980, the Oklahoma police received information from a confidential informant that Peters was killed because he had "ripped off" Paul Mazzell, and the hit man had come from Charleston, South Carolina. (Tr. 174). Lee Crowe was from Charleston, South Carolina.

Mr. Macy, the District Attorney, testified that his office was aware of the investigation of Lee Crowe. (Tr. 108). He testified that this information was not given to defense counsel for three reasons: The scene witnesses did not pick Crowe out of the photo spread (Tr. 111); Crowe had an alibi (Tr. 112); and Crowe's bullet casings did

not match those found at the scene. (Tr. 112). In reality, the alibi was unconfirmed (Tr. 293), and the scene bullet casings were not connected in any way to the Petitioner either. (Tr. 295). Mr. Hardwicke, the Assistant District Attorney, admitted that when a defense of alibi is involved, identity is the key issue. (Tr. 223). He further admitted that if there was evidence that Lee Crowe matched the description of the shooter, had motive to commit the murder, had the opportunity because he was in Oklahoma, habitually used a weapon of the same caliber of that used in the murder, and had no alibi, this would be exculpatory evidence because it would impeach the eyewitnesses. (Tr. 224).

B. THE LAW

The standard used to determine whether a prosecutor has a duty to disclose exculpatory evidence to the defendant depends upon the circumstances surrounding the nondisclosure. *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). This Court in *Agurs* gave three situations in which the *Brady* rule applies. The first situation involves the use of perjured testimony where the prosecution knew or should have known of the perjury. The second situation occurs when the defendant makes a pretrial request for specific evidence. The withheld evidence is considered material if it might affect the outcome of the trial. Finally, there is the situation in which no specific request for exculpatory evidence was made. This case involves the third situation.

The test which applies when the defense makes a general request for exculpatory evidence or no request at all is that the omitted evidence must create a reasonable doubt that did not otherwise exist, evaluated in the

context of the entire record. *United States v. Agurs, supra.* "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Agurs,* 427 U.S. at 113.

Agurs distinguishes between evidence that was available to the prosecutor during trial and evidence discovered from a neutral source after trial. "On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial." 427 U.S. at 111. This Court reasoned that if the standard that applies to the usual motion for a new trial based on newly discovered evidence, also applied when the evidence was in the State's possession, "there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Id.* Thus, this Court said that the defendant should not have to satisfy the severe burden of demonstrating that the withheld evidence *probably* would have resulted in acquittal.

In the instant case, the prosecution had knowledge and possession of the undisclosed evidence before and during trial. The State admitted that two of its assistants helped coordinate Lee Crowe's investigation.

The constitutional obligation to disclose exculpatory material is not measured by the willfulness or culpability of the prosecutor, nor is it measured by the nondiligence of defense counsel. *See United States v. Agurs, supra.* Due process guarantees that ". . . the defendant should not suffer for the mistakes of his counsel." *Castleberry v. Crisp,* 414 F. Supp. 945, 949 (N.D. Okl. 1976). *See United States v. Poole,* 379 F.2d 645 (7th Cir. 1967).

> That defense counsel did not specifically request the information, that a 'diligent' defense attorney might have discovered the information on his own with sufficient research, or that the prosecution did not suppress evidence in bad faith, are not conclusive, due process can be denied by failure to disclose alone.

United States v. Hibler, 463 F.2d 455, 459 (9th Cir. 1972). "The essential fairness of the procedure—not the diligence of the defense counsel or the good or bad faith of the prosecutor—is the key issue." *United States v. Steffen,* 641 F.2d 591, 594 (8th Cir.), *cert. denied,* 452 U.S. 943, 101 S.Ct. 3091, 69 L.Ed.2d 959 (1981).

Also, the State may not be excused from its duty to disclose material facts known to it prior to trial solely because of a conclusion that they would not be admissible at trial. *Castleberry,* 414 F. Supp. at 951. *See Giles v. Maryland,* 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed. 2d 737 (1967) (Fortas, J. concurring); *Smith v. United States,* 375 F. Supp. 1244 (E.D. Va. 1974) (it may be sufficient that the undisclosed information, though not admissible in evidence would have been somehow useful to the defense in structuring its case); *United States v. Gleason,* 265 F. Supp. 880 (S.D. N.Y. 1967). In *Martinez v. Wainwright,* 621 F.2d 184 (5th Cir. 1980), the Court held that even if the nondisclosed evidence was inadmissible to prove prior convictions because of hearsay objections, it at least would have provided the defense with the ability to contact the appropriate penal facilities to acquire an official record which would have been admissible.

In the case at bar, the defense verbally asked the prosecution whether there were any other suspects and

the prosecution responded that there were no other suspects. The unfortunate result was that the defense did not find out about suspect Lee Crowe and the surrounding investigation until long after trial. The State is charged with the duty to disclose information not readily discovered by the defense counsel, yet within the hands of the police. *See Cramer v. Fahner,* 683 F.2d 1376 (7th Cir.), *cert. denied,* 459 U.S. 1016, 103 S.Ct. 376, 74 L.Ed.2d 509 (1982). *Martinez v. Wainwright, supra.* The State's facilities for discovering evidence are usually far superior to the defendant's.

> This imbalance is a weakness in our adversary system which increases the possibility of erroneous convictions. When the Government [or State] aggravates the imbalance by failing to reveal evidence which would be helpful to the defendant the constitution has been violated. The concern is not that law enforcers are breaking the law, but that innocent people may be convicted.

Levin v. Clark, 408 F.2d 1209, 1211 (D.C. Cir. 1967).

The Petitioner submits that the Oklahoma City Police Department had special means, unavailable to the defense, of discovering certain information. They had the assistance of the out-of-state police, who could relay pertinent details never disclosed to the defense. Instead, the Oklahoma City Police Department performed the decision-making process of determining which evidence was crucial to a jury on guilt and which evidence was not, a function that the United States Constitution bestows on counsel for the defendant.

This Court established the test for determining whether exculpatory evidence is material in situations where the defense makes no request.

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Agurs, 427 U.S. at 112-13 [footnotes omitted].

Applying the principles set forth in *Agurs* to the case at bar, attention should be given to the fact that this was a close, hotly-contested case. If the State withheld even slight evidence tending to disprove the Petitioner's guilt, due process has been violated and a new trial is required. The State's case depended almost entirely on the testimony of two witnesses who identified the Petitioner as being present at the scene of the crime at some time before the shootings. The first of these witnesses was Mary Chilton. This was the witness whose testimony was enhanced by hypnosis. Her description of the man at the scene of the crime did not match the Petitioner. She described the man as very pale in color—"almost a white, whitish-gray." This was in direct conflict with the testimony of four neutral witnesses who swore that the Petitioner had a deep suntan at the time in question. Furthermore, her testimony that the man at the scene did not wear glasses conflicts with the known condition of the Petitioner's eyes. Finally, the witness Chilton was

impeached by her previous identification of one William Wayne Simmons as the individual at the scene of the crime. In fact, one of the police officers had previously sworn that Ms. Chilton *positively identified* William Wayne Simmons as the white male who was standing by the vending machine and later observed running from the scene just seconds after the shots had been fired.

The other scene witness who identified the Petitioner was Mrs. Pitchford. She also described the face of the man at the scene as "very, very white." Furthermore, her testimony makes it clear that she only received a very short glimpse of the man in very poor lighting from a distance. In short, the scene identification was very questionable.

On the other hand, the Petitioner called no less than twelve alibi witnesses who placed him three hundred miles away until within an hour of the crime. The testimony of the Petitioner and his wife placed the Petitioner three hundred miles away until the very moment of the crime. The State did little to rebut the testimony of the alibi witnesses, but, instead, relied heavily on testimony which purported to show that it was remotely possible to travel from Tyler, Texas, to the scene of the crime in less than an hour. Evidence adduced at the hearing on the First Motion for New Trial showed that this theory was not only false, but *scientifically impossible.*

Thus, the jury verdict in this case can only be described in the words of this Court, as "already of questionable validity." The evidence known to the prosecution, but withheld from the defense, showed that another individual had motive and opportunity to commit these murders. He traveled to Oklahoma for that purpose. The physical

description of this individual, Lee Crowe, closely matched the description of the man at the scene. Furthermore, Lee Crowe was known to habitually use the type of weapon and ammunition used in the killings. Due process required that this evidence be called to the attention of defense counsel.

The Oklahoma Court of Criminal Appeals, in upholding these convictions and sentences to death, disposed of the Petitioner's argument that it should not be up to the prosecution or police to determine the jury question of whether another person and not the Petitioner was the killer as follows:

> In regard to the potential suspects, each had been eliminated from consideration upon the positive identification of appellant by Chilton and Pitchford. A police detective testified at the hearing for new trial that each of these suspects were eliminated as the evidence uncovered pointed toward appellant's guilt and not theirs.
>
> * * *
>
> From the viewpoint of the prosecution in preparing the case for trial, and throughout the course of the trial, there was insufficient evidence to link any of the other suspects to the killings, when compared to the evidence implicating appellant, which would have put the prosecution on notice of a duty to reveal such evidence *sua sponte*.

Bowen v. State, supra, at 5-6.

In *Grant v. Alldredge,* 498 F.2d 376 (2d Cir. 1974), the government contended that the information was not given the defense, "because the investigators were satisfied to 'wash out' [the other person] as a suspect." The Court in *Grant* said:

> A full disclosure could have, indeed probably would have, led to defense discovery of all the information involving [the other suspect]. That information, in the aggregate, could then have been used by Grant's attorney to support a theory that it was likely that [the other suspect] had committed the crime. Such a defense, it seems to us, could have "induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

Id. at 382.

In recognizing the effect suppressed evidence might have on a jury, the Court stated:

> This standard [of materiality] requires speculation because there is no sure way to know how the jury would have viewed any particular piece of evidence. Nor is it possible to know whether revelation of the evidence would have changed the configuration of the trial—whether defense counsel's preparation would have been different had he known about the evidence, whether new defenses would have been added, whether the emphasis of the old defenses would have shifted. Because the standard requires this kind of speculation we cannot apply it harshly or dogmatically.

Levin v. Clark, supra, at 1212.

The evidence withheld by the State was favorable to the Petitioner, and a jury clearly would have acquitted this innocent man had it heard this evidence that another man was the killer. Because the evidence would have created a reasonable doubt that did not otherwise exist, Petitioner's convictions should be reversed and remanded for a new trial.

II. THE PETITIONER WAS DENIED DUE PROCESS OF LAW IN THAT HE DID NOT RECEIVE REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH STAGES OF HIS CAPITAL MURDER TRIAL.

A. THE ACTS AND OMISSIONS OF TRIAL COUNSEL

The record reflects that trial defense counsel engaged in the following acts and omissions:

1. *At Guilt Or Innocence Hearing*

(a) He filed a motion for continuance and a motion in limine but failed to file such pre-trial motions as a motion for discovery, a motion for production of exculpatory evidence, and a motion challenging the out of court identification of the Petitioner by State's witness Mary Chilton after she had undergone hypnosis;

(b) He failed to cross-examine the State's witness Mary Chilton on the basis of her hypnotically enhanced testimony;

(c) He failed to subpoena the Petitioner's co-defendant, who could have testified that he had never known the Petitioner, and did not hire or ask the Petitioner to commit the murders. (Tr. 863);

(d) He failed to introduce evidence in surrebuttal which would have demonstrated that the State's airplane theory was a scientific impossibility;

(e) He failed to request any jury instructions, particularly an instruction on the law of circumstantial evidence, and failed to offer any specific objections to the instructions given by the court;

(f) He failed to make any objection to the prosecutor's argument during the guilt or innocence stage, in which the prosecutor argued outside the record about a hypothetical airplane theory to rebut the Petitioner's defense of alibi (Tr. 628-31, 669);

(g) He failed to make any objection to the prosecutor's argument in which the prosecutor referred to the Petitioner as a "professional hit man" (Tr. 624, 634, 660, 661, 672, 673 675);

(h) He failed to make any objection to the prosecutor's argument in which the prosecutor referred to the crime rate, society's expectations, death as a deterrent, and injected his personal opinion into the case (Tr. 676-77, 682, 699, 700, 702);

2. *At Capital Sentencing Hearing*

(a) He failed to present *any* evidence in behalf of the Petitioner during the death penalty sentencing stage of the trial (Tr. 693); and

(b) He failed to present *any* argument in behalf of the Petitioner during the death penalty sentencing stage (Tr. 702), even though requested to do so by the Petitioner (Tr. 924).

B. THE LAW

The standards for judging attorney performance were established after Petitioner's appeal was argued before the Oklahoma Court of Criminal Appeals. In *Strickland v. Washington,* ____U.S.____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court held that the proper standard is that of reasonably effective assistance of counsel. *Id.* 104 S.Ct. at 2064. No particular set of detailed rules for

counsel's conduct was established; instead the convicted defendant must identify acts or omissions alleged not to have been the result of reasonable professional judgment. These have been set out in Section A above. Once that has been done, the reviewing court is to determine whether same were outside the wide range of professionally competent assistance. Crucial to this determination is the fact that defense counsel's function is to make the adversarial testing process work in the defendant's case.

In *Strickland,* sufficiency of the evidence was no factor, since the defendant therein had pleaded guilty after giving multiple confessions. The real issue in that case was counsel's performance at the sentencing stage. In the instant case, the Petitioner has a clearly meritorious and valid claim of ineffective assistance of counsel at *both* stages of this contested case.

In Petitioner's case, the Oklahoma Court of Criminal Appeals treated this most important constitutional question in one paragraph. At page nine of its opinion, that court states:

> Even with the use of his hindsight enhanced vision, the appellant has simply failed to demonstrate that there is a reasonable probability that, absent the *alleged errors* of which he now complains, the verdict of the jury would have been altered or that his punishment would have been lessened. See, *Strickland v. Washington,* 466 U.S. ____, 104 S.Ct. 2052, ____L.Ed.2d____ (1984). Moreover, the appellant has made no showing that the justice of his sentence was rendered unreliable by *a breakdown in the adversarial process* caused by deficiencies in counsel's assistance. (emphasis added).

Bowen v. State, supra at 9.

In view of this conclusion, a review of the treatment of the seventeen grounds of error urged on direct appeal in the Oklahoma Court of Criminal Appeals is necessary.

The Petitioner attacked the trial court's failure to give the required Oklahoma instruction on circumstantial evidence. The Court: "Appellant's assignment lacks merit for several reasons. First, his trial counsel failed to request such an instruction." *Bowen, supra,* at 2. Next, the Petitioner raised the issue of the trial court's failure to instruct the jury on a necessary element of the offense alleged. The Court: "Again it should be noted that no instructions were offered by defense counsel on this issue or any other issue. Therefore we will only determine whether the lack of the appellant's now proposed instruction constituted fundamental error." *Id.* at 4. When the Petitioner alleged reversible error for failure by the State to deliver exculpatory evidence, the Court stated: "However, as appellant recognizes, no request was made for exculpatory evidence prior to trial." *Id.* at 5. When the Petitioner assigned as error the admission of extrinsic crime evidence, the Court held, "Error, if any in this regard, was clearly invited and therefore not grounds for an error recognizable on appeal." *Id.* at 8.

When the Petitioner urged reversible error because of improper final argument by the prosecutor, including, *inter alia,* referring to the Petitioner as a "professional hit man," the Court answered, "As appellant recognizes in his brief, there was a failure to object at trial to any of these arguments. Because of his failure to object, the appellant has waived further consideration of the arguments, except those arguments which were so fundamentally prejudicial that the court could not have been corrected by instructions to the jury (sic)." *Id.* at 8-9.

When the Petitioner raised the issue that his Motion for New Trial should have been granted because of the newly discovered evidence that the State's rebuttal "airplane theory" was scientifically impossible, the Court held, "nevertheless, once the alibi defense was raised, addressing as it did the issue of time, the appellant could have with reasonable diligence discovered before the trial and presented at trial all the evidence which was presented at the motion for new trial hearing regarding the State's so called airplane theory." *Id.* at 11.

After the Petitioner's appellate counsel called the co-defendant Behrens to the stand at the hearing on Motion for New Trial to testify that he had never met the Petitioner, did not know him, and did not ask him to commit the murders, as alleged by the State, the Court held that evidence not supportive of a new trial because, "The appellant did not use due diligence when he failed to subpoena Behrens and thus elicit his testimony at the trial." *Id.* at 12.

In response to Petitioner's appellate ground that error occurred because a police detective knew of a threat to the victim by another suspect, but failed to include it in his report or inform the defense, the Court stated, "Not only was there a failure to exercise due diligence in obtaining this testimony at trial, the testimony at the hearing on the Motion for New Trial fails to demonstrate anything which was material to the appellant." *Id.*

When the Petitioner filed his Second Motion for New Trial on the basis of newly discovered evidence in that a South Carolina investigation revealed that the same Lee Crowe discussed in Reason For Granting Certiorari Number One, *supra*, had been overheard discussing kill-

ing the victim Ray Peters with Peter's estranged wife Patsy only days before the killing, the Court responded, "It [the trial court] found that the information regarding Crowe could have been discovered through the exercise of due diligence by requesting a list of suspects prior to trial, but the defense failed to do so." *Id.* at 13.

When the Petitioner attacked the admissibility of the hypnotically-enhanced testimony of the key witness Mary Chilton, the Court held, "By failing to object to the testimony at the time of its admission, appellant has waived review of the matter by this Court." *Id.* at 14.

When the appellate issue was raised regarding the constitutional infirmity of the Oklahoma death penalty statute governing the sentencing stage, and the corresponding jury instructions, which failed to clearly place the burden of proof on the State, and also failed to prescribe the standard of proof needed as proof beyond a reasonable doubt, the Court held, "Prior to the issuance of this instruction, the appellant did not object to the instructions, did not offer any instructions of his own, and failed to challenge the validity of 21 O.S. 1981, § 701.11. In view of his failures in this regard and after a review of the record on appeal these issues have been waived and are not properly before us." *Id.* at 15.

Thus, eleven separate issues on appeal were decided adversely to the Petitioner based on specified errors identified by the *appellate court*. Clearly, the first prong of the *Strickland* test has been met in the instant case.

The second prong, a showing of prejudice by an undermining of confidence in the outcome, has also surely been met. An innocent man, who was over 300 miles away from the scene of the crimes, was convicted of capital

murder. What more prejudice can be shown? The Oklahoma Court of Criminal Appeals totally ignored the most glaring indicia of incompetency. The major teaching of *United States v. Cronic,* ___U.S.___, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) decided the same day as *Strickland v. Washington, supra,* is that the focus must be on the adversarial process, that is, if the defense lawyer fails to subject the prosecution's case to meaningful adversarial testing, there has been a denial of the Sixth Amendment right to counsel. *United States v. Cronic, supra,* 104 S.Ct. at 2045-2046. In *Strickland v. Washington, supra,* this Court also held that: "A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision [citations omitted] that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Id.,* 104 S.Ct. at 2064.

In the capital sentencing proceeding in the instant case, trial defense counsel *did nothing.* He just sat there. He put on no evidence, although the Petitioner, the Petitioner's wife and step-daughter, and others, were available to testify, and, astoundingly, *he gave no final argument.* As this Court stated in *Strickland,* "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command." *Id.,* 104 S.Ct. at 2063. The Oklahoma Court of Criminal Apeals totally ignored these facts. No mention was made of the sentencing stage deficiencies of counsel. The only pronouncement by that court is as follows: "Moreover, the appellant has made no showing that the

justice of his sentence was rendered unreliable by a breakdown in the adversarial process caused by deficiencies in counsel's assistance." *Bowen v. State, supra,* at 9.

There was no adversarial process at the Petitioner's sentencing proceeding.

The decision by the Oklahoma Court of Criminal Appeals is in conflict with the highest courts of other states on this same federal constitutional right to effective assistance of counsel. The California Supreme Court concluded that counsel's failure to call witnesses in mitgation in a death penalty case denied the defendant effective assistance of counsel. *People v. Frierson,* 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979). In *State v. Myles,* 389 So.2d 12 (La. 1980), the Louisiana Supreme Court addressed a situation where counsel presented no evidence in a death penalty hearing, but *did* conduct final argument. Reversing for lack of effective assistance of counsel, that court said:

> In his closing argument the defense counsel did little more than acknowledge the existence of an aggravating circumstance, state that the confession may be regarded as a mitigating circumstance, and submit the matter to the jury. He did not ask the jury to spare the defendant's life. He did not remind the jury that Elvin Myles is a human being or urge the jurors to be mindful of their awesome responsibility in deliberately choosing whether he should live or die. Nor did he emphasize to the jurors any of their legal obligations designed to prevent the arbitrary or capricious imposition of the death penalty, e.g., the requirement that they base their findings upon a beyond a reasonable doubt certainty; their duty to weigh any aggravating circumstance

> found against any and all mitigating circumstances; the duty of each individual juror to hold fast to his honest convictions and to vote to prevent a unanimous verdict in the event he is convinced that the death penalty is inappropriate.
>
> Moreover, the defense attorney's lackluster argument followed his submission of the case for his client's life without evidence. We cannot say that counsel acted unreasonably in deciding not to present any evidence . . . *Having rested his client's case without evidence, however, it was even more imperative that defense counsel advocate his client's cause in closing argument.* The practice of law is a partisan endeavor requiring those who engage in it to represent their clients vigorously even in the face of overwhelming adversity.
>
> The attorney's closing argument, amounting to little more than a mechanical submission of the defendant's fate to the decision-making process with no attempt to influence it, definitely fell below the minimum standard of competency constitutionally required. "[*T*]*he failure to make a closing argument or making one which is clearly perfunctory has been found to constitute ineffective assistance.*" [Cites omitted].

Id. at 30-31 (emphasis added).

In each of those cases, as well as in *Strickland v. Washington, supra,* counsel argued for the life of his client. While one might be able to conjure up a legitimate reason to place no evidence before the sentencing authority, *e.g. Strickland v. Washington, supra,* there can be *no* argument made that failure to produce evidence *combined with* failure to present final argument can ever be an adversarial testing of the prosecution's case in a death penalty proceeding.

This is an example of a situation where counsel's incompetence is so serious that it rises to the level of a constructive denial of counsel which can constitute constitutional error without any showing of prejudice. *Strickland v. Washington, supra,* 104 S.Ct. at 2073, n.2, (Brennan, J., concurring).

Clearly, in the Petitioner's case, the resulting death penalties are unreliable because there was a total breakdown in the adversarial process that our system counts on to produce just results. The Petitioner's sentencing proceeding was fundamentally unfair.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Oklahoma.

Respectfully submitted,

LAW OFFICES OF
JACK B. ZIMMERMANN

By: _____
JACK B. ZIMMERMANN

Five Post Oak Park, Suite 1130
Houston, Texas 77027
Tele: (713) 552-0300

Attorneys for Petitioner,
Clifford Henry Bowen
(On Appeal Only)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within and foregoing Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Oklahoma by mailing three copies thereof to counsel of record in an envelope properly stamped and addressed as follows:

Michael C. Turpen
Attorney General Of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

NO. F-81-315

CLIFFORD HENRY BOWEN,
Appellant,

v.

STATE OF OKLAHOMA,
Appellee.

(Filed November 30, 1984)

OPINION

BUSSEY, Presiding Judge:

Clifford Henry Bowen was charged with and convicted of the Frst Degree Murders of three men at the Guest House Inn in Oklahoma City on July 6, 1980. Following the convictions, he appealed; and prior to our decision being rendered, he lodged his second request for a new trial. The ground for retrial was newly discovered evidence, and we ordered the district court to conduct an evidentiary hearing to determine the merit of his motion. The district court heard the evidence and entered its findings of fact and conclusions of law denying appellant's motion. Appellant's motions for new trial lack merit, and his judgments and sentences should be AFFIRMED.

On July 6, 1980, at approximately 2:00 a.m., three people were killed as an executioner fired two shots into

each of them with a .45 caliber gun. The victims were Ray Peters, whom the prosecution theorized to be the killer's desired victim, Marvin Nowlin, and Lawrence Evans. These three were the last to leave a poolside party at the Guest House Inn which started the evening of July 5, 1980. Sometime after midnight, a large man appeared in the area of the concession machines by the pool. Later, Mary Lee Chilton positively identified appellant as the man standing near the machines on the evening in question and whom she observed as she passed by on the way to her room prior to the shootings that morning. Carrie Pitchford also identified appellant as the man standing by the poolside concession machines whom she observed when she looked out three times from the window of her room in the motel.

Appellant was initially linked to the shootings because of his suspected connection to Harold Behrens. Behrens had visited Ray Peters, a drug dealer working for him, by the poolside on the evening of the killings. In an uncharacteristic gesture, Behrens put his hand on Peters' shoulder in plain view of the man standing by the concession machines as he left the gathering of people. Behrens had worked in the investigation of appellant by the Oklahoma City Police Department in 1975 as a police officer. Behrens suddenly resigned, and within a day or two, appellant dropped out of sight. A detective who had also worked in the investigation made the connection between Behrens and appellant when he heard the suspect's description. Both Chilton and Pitchford identified appellant in a photographic lineup and at an in-person lineup.

Appellant's defense at trial was alibi, as he produced a number of witnesses who testified he was at a rodeo in

Tyler, Texas, until around midnight on July 5, 1980. The State theorized that appellant left Tyler, Texas, by jet and was able to reach the murder scene within 45 minutes.

On appeal, appellant's first assignment of error is that the trial court's instruction to the jury regarding circumstantial evidence was deficient in that it applied only to their finding of malice aforethought. He claims that all of the State's evidence concerning who committed the homicides was circumstantial and that our case law dictates that an instruction be given to the jury directing that the circumstances must each be consistent with one another and inconsistent with any reasonable hypothesis other than the defendant's guilt, citing *Hager v. State*, 612 P.2d 1369 (Okl. Cr. 1980) and *Roth v. State*, 532 P.2d 1397 (Okl. Cr. 1975).

Appellant's assignment lacks merit for several reasons. First, his trial counsel failed to request such an instruction.

> We have consistently held that where counsel is not satisfied with instructions that are given, or desires the court to give any particular instruction, it is the duty of counsel to prepare and present to the court such desired instructions and request that they be given. In the absence of such a request, the Court of Criminal Appeals will not reverse the case if the instructions generally cover the subject matter of inquiry and there is no fundamental error.

Luckey v. State, 529 P.2d 994, 996 (Okl. Cr. 1974). Further, we held in *Knight v. State*, 73 Okl. Cr. 107, 118 P.2d 255 (1941), that defense counsel's failure to request such an instruction will not stop this Court from reviewing this issue if the evidence presented at trial

was wholly circumstantial and weak in nature. We find the evidence in the present case is neither.

At trial, the State presented the testimony of Chilton and Pitchford who identified appellant as the man who maintained a post by the concession machines near the pool immediately prior to the slayings. At approximately 2:00 a.m. the sound of gunshots rang through the motel. The manager of the motel and his wife testified they stepped to the office window to see some of the six blasts as they erupted, and later to see a large man flee the scene. After appellant was arrested in Tyler, Texas, and Oklahoma City Police interviewed him there in connection with the homicides, without being informed as to the subject of their investigation or of any details surrounding the killings, appellant volunteered that he couldn't have committed the crime as he was "too fat to run." The State's evidence was not so weak or wholly circumstantial so as to bring this case within our holding in *Knight*.

Additionally, though the trial court instructed the jury regarding circumstantial evidence in connection with its instruction concerning malice aforethought, the language of the instruction was sufficiently broad to encompass evidence of identity. The instruction includes the language:

> To warrant a finding upon circumstantial evidence, each fact necessary to the conclusion sought to be established (that is malice aforethought) must be proved by legal and competent evidence beyond a reasonable doubt. Further, all the facts and circumstances proved must not only be consistent with such finding but consistent with each other and inconsistent with any other reasonable conclusion and sufficient to produce in your minds *a reasonable*

> *moral certainty that the accused committed the offense charged against him with malice aforethought.* (Emphasis added.)

Thus, the jury was properly instructed as to how it must determine each element to a reasonable moral certainty, including identity, though the evidence be circumstantial.

Next, appellant assigns as error the trial court's failure to instruct the jury that they had to find beyond a reasonable doubt that he acted jointly with co-defendant Behrens as charged in the information. Again it should be noted that no instructions were offered by defense counsel on this issue or any other issue. Therefore we will only determine whether the lack of the appellant's now proposed instruction constituted fundamental error. Fundamental error has been described by this Court as error which when considered "in view of the whole record, is so fundamentally wrong and prejudicial that it deprived the defendant of a substantial right." *Jones v. State,* 77 Okl. Cr. 285, 141 P.2d 109 (1943). Allegations and evidence of joint action taken with another person in the commisison of the crime were certainly relevant matters to be addressed at trial. They were relevant to show motive but did not of themselves stand as essential or material elements of the crime of murder. Therefore, we do not find the lack of an instruction requiring the State to establish joint action to constitute fundamental error. Accordingly, this assignment of error is without merit.

Appellant alleges in his appeal and in his second motion for new trial that reversible error occurred when the prosecution failed to deliver exculpatory evidence to defense counsel. However, the record does not reveal

that defense counsel made a formal request for exculpatory evidence, though trial counsel contends he made an oral pretrial inquiry as to the existence of other suspects to which the prosecution answered in the negative. He now asserts that the prosecution had a duty to make known to the defense the identity of three potential suspects.

One was William Wayne Simmons. He had been arrested after Chilton picked his picture from an array of photographs. There was hearsay evidence supposedly revealed to the prosecution that Simmons told a man named Thomas Upton, Jr. that he had been at the Guest House Inn on the night of the killings. But Simmons was subsequently released when the eyewitness told officers at a live lineup that the assailant was much larger in size than Simmons.

There was also evidence that one of the three victims, Marvin Nowlin, had recently been threatened with bodily harm by a man named Larry Lowell. Appellant asserts that if the jury had been exposed to this evidence, it would have created a reasonable doubt which did not otherwise exist, citing *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

Subsequent to the trial of this matter, a statement was made to South Carolina police by Deana Burris, a roommate of Ray Peters' ex-wife, Patsy Peters. This statement implicated a man named Lee Crowe, the boyfriend of Patsy Peters, who was of similar stature to that of appellant and who was within the State of Oklahoma at the time of the killings. This statement, and a subsequent one given by Deana Burris forms the new evidence which appellant claims justifies a second trial and which will be

discussed later in this opinion. Appellant maintains, however, that Lee Crowe had been a pretrial suspect of which the State had a duty to advise the defense.

Appellant asserts the suppression of the allegedly exculpatory evidence regarding these suspects denied him due process of law under the authority of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). However, as appellant recognizes, no request was made for exculpatory evidence prior to trial. So analysis of any duty of the prosecution to deliver evidence to the defense must be made from a view before and during the trial. In *Agurs,* the United States Supreme Court stated in this regard:

> [T]he prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.

427 U.S. at 108, 96 S.Ct. at 2400.

> [I]f the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made.

427 U.S. at 107, 96 S.Ct. at 2399.

In regard to the potential suspects, each had been eliminated from consideration upon the positive identification of appellant by Chilton and Pitchford. A police detective testified at the hearing for new trial that each of these suspects were eliminated as the evidence uncovered pointed toward appellant's guilt and not theirs.

In *Castleberry v. Crisp,* 414 F.Supp. 945, 951 (N.D. Okl. 1976), the court noted:

> that in a case where several eye witnesses identify a defendant as the perpetrator of a crime, or where the physical evidence clearly points to the guilt of a defendant, evidence indicating that someone else may have committed the crime would have to be almost conclusive in order to be material.

From the viewpoint of the prosecution in preparing the case for trial, and throughout the coure of the trial, there was insufficient evidence to link any of the other suspects to the killings, when compared to the evidence implicating appellant, which would have put the prosecution on notice of a duty to reveal such evidence to the defense *sua sponte*. After evaluating the alleged nondisclosure in the context of the entire record and especially when we consider the unwavering eyewitness identification of the appellant by more than one person, we find that the appellant was not denied due process of law or a fair trial in this regard.

In his fourth assignment of error, the appellant maintains that the evidence was insufficient to sustain his conviction. In support of this contention he argues that there was insufficient evidence to prove the identity of the shooter and secondly that there was insufficient evidence to prove joint action.

Appellant's argument that there was insufficient evidence to prove the identity of the shooter is patently frivolous. Appellant points to several discrepancies in the evidence. There was clearly enough evidence presented at trial from which the jury could reasonably have concluded that he was the shooter and was guilty as charged. Therefore there is no reason for the Court of Criminal Appeals to interfere with the verdict. See, *Truelove v. State*, 545 P.2d 1270, 1271 (Okl. Cr. 1976). There was

conflicting testimony by Chilton and Pitchford of the color of the shirt worn by the man in the concession area. There was evidence from the State's witness that the man was pale. Appellant provided testimony that he was tanned on the date in question. "[W]here there is evidence from which the jury could conclude that the defendant is guilty as charged, we will not interfere with the verdict even though there may be sharp conflicts in the evidence." *Renfro v. State,* 607 P.2d 703 (Okl. Cr. 1980). Regardless of how the appellant now characterizes the evidence presented, the record remains clear that two witnesses saw a man they each identified as the appellant standing near the concession area just prior to the killing. Two other witnesses, who actually saw the shooting, described the shooter sufficiently to establish that he was the same man observed earlier in the concession area by the first two witnesses.

Appellant's argument that there was insufficient evidence to prove that he had acted jointly with Harold Dean Behrens is likewise without merit. Behrens' touching of one of the victims as he left the pool area and while in full view of the appellant in conjunction with Behrens' prior connection to the appellant is strong circumstantial evidence of joint action. This is especially true when one considers the fact that the victim touched was a person who dealt drugs for Behrens and who Behrens had a motive to eliminate because Peters had become a liability to him. Jack Zumwalt, Behrens' homosexual lover testified that Behrens told him in June of 1980 that he was afraid Peters was going to become a police informant because he was facing several possible convictions. Section 432 of 22 O.S. 1981, provides that an information need not specifically allege additional acts when charging partici-

pants in a crime to make distinctions of accessories and of principals. (*Bowen v. State,* 606 P.2d 589 (Okl. Cr. 1980). Though there was evidence of joint action, appellant could have been convicted as a principal regardless of the presence of surplusage in the information. Appellant's fourth assignment is without merit.

In his next assignment of error, appellant argues that the trial court erred in permitting the State to introduce evidence of other crimes. He first complains that testimony by a police sergeant improperly revealed to the jury that he had been investigated by the Oklahoma City Police Department's organized crime unit. This testimony however was relevant in that it served to supply the link between the appellant and Behrens. Behrens had been a police officer involved with the organized crime unit's investigation of the appellant in 1975. Appellant further complains that testimony was introduced that he made his living through gambling. In other circumstances, this could have been improper, but in view of the crimes committed and the circumstances surrounding their commission, the appellant's information concerning his claimed occupation was admissible. Appellant also complains that testimony concerning illegal activities conducted by Behrens were improperly allowed. These activities by Behrens were, however, introduced to shed further light on reasons for commission of the crimes. Additional arguments that appellant's life style required resort to illegal activities and references to the appellant as a professional hit man and killer were fair inferences based on the facts presented. Clearly, all these matters were admissible as relating to the appellant's motive and intent in the commission of the crimes. 12 O.S. 1981, § 2404(B). "Wide latitude

is permitted in the admission of evidence to establish motive." *Frye v. State,* 606 P.2d 599 (Okl. Cr. 1980).

The remaining matter of which appellant complains in this assignment of error is the testimony that he was arrested at the same time several firearms were seized from a residence in which he was staying. This evidence was introduced by the prosecution in response to appellant's denial of knowing anything about guns. Error, if any in this regard, was clearly invited and therefore not grounds for an error recognizable on appeal. *Goodrich v. State,* 553 P.2d 210 (Okl. Cr. 1976). This assignment of error is without merit.

In his sixth assignment of error, appellant cites several instances of arguments by the prosecution which he maintains denied him his right to a fair trial. As appellant recognizes in his brief, there was a failure to object at trial to any of these arguments. Because of his failure to object, the appellant has waived further consideration of the arguments, except those arguments which were so fundamentally prejudicial that the court could not have been corrected by instructions to the jury. *McCall v. State,* 539 P.2d 418 (Okl. Cr. 1975). After reviewing the arguments complained of and not finding any fundamentally prejudicial, this assignment of error is overruled.

As his seventh assignment of error, the appellant asserts that he was denied effective assistance of counsel. In his brief and during oral argument before this Court, a plethora of actions and inactions by his trial counsel is set forth to substantiate his assertion. However, for purposes of this appeal it is not necessary to enumerate each of the alleged mistakes of counsel. Appellant has fallen to the temptation of using the benefits of hindsight

to now second guess and assert inadequaces on the part of his veteran and very successful trial counsel. Even with the use of his hindsight enhanced vision, the appellant has simply failed to demonstrate that there is a reasonable probability that, absent the alleged errors of which he now complains, the verdict of the jury would have been altered or that his punishment would have been lessened. See, *Strickland v. Washington,* 466 U.S.____, 104 S.Ct. 2052, ____ L.Ed.2d ____ (1984). Moreover, the appellant has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversarial process caused by deficiencies in counsel's assistance. See, *United States v. Cronic,* 466 U.S.____, 104 S.Ct. 2039, ____ L.Ed.2d ____ (1984). Utilizing the standards set forth in *Strickland v. Washington,* supra, it cannot be said that the appellant has been denied reasonably effective assistant of counsel.

Next he alleges that he should be granted a new trial based upon the discovery of new evidence. The statutory grounds for granting a new trial based on the discovery of new evidence are twofold. First, the new evidence must be material to the defendant and second, the new evidence must be evidence which the defendant could not with reasonable diligence have discovered before the trial. 22 O.S. 1981, § 952. Whether or not a motion for new trial shall be granted is a matter addressed to the discretion of the trial court which, absent an abuse of discretion will not be overruled by the Court of Criminal Appeals. *Lemmon v. State,* 538 P.2d 596 (Okl. Cr. 1975). In determining whether the trial court abused its discretion by refusing to grant a new trial based on the discovery of purportedly new evidence, this Court looks to whether the evidence is material, whether the accused or his coun-

sel exercised the diligence to discover the evidence before trial, whether the evidence is cumulative and whether there is a reasonable probability that if the newly discovered evidence had been introduced at the trial it would have changed the results. *Marlow v. City of Tulsa*, 564 P.2d 243 (Okl. Cr. 1977).

In support of his first motion for new trial, the appellant presented the trial court with five separate matters. It is argued that both separately and cumulatively they constituted a valid basis for a new trial Appellant first argues that testimony presented at the motion hearing regarding the alleged scientific impossibility of traveling from the rodeo grounds outside of Tyler, Texas, where witnesses saw the appellant, to the Guest House Inn in Oklahoma City, the scene of the homicides, within the time parameters established by trial testimony constituted newly discovered evidence which could not have, with reasonable diligence, been discovered before trial. Appellant contends that the "airplane theory" emerged on the last day of the trial thereby depriving him of an opportunity to marshall evidence against the State's theory of the case. The State, in response to the appellant's alibi witnesses had, on rebuttal, elicited testimony from a pilot who stated that it could have been possible for a jet to have transported the accused from an old airfield near the rodeo grounds to Oklahoma City within a time frame which would account for the alibi witnesses and yet justify the State's theory of the case.

There is a certain degree of controversy in the record as to whether the defense had knowledge prior to trial with regard to the prosecutor's intention to present an "airplane theory" on rebuttal. This is not the crucial issue.

The issue is whether the appellant "could not with reasonable diligence have discovered" the new evidence before the trial. 22 O.S. 1981, § 952.

At the hearing on the motion for new trial the appellant went to great lengths to show in detail why it would have been impossible for him to have flown to Oklahoma City in time to commit the murders. Nevertheless, once the alibi defense was raised, addressing as it did the issue of time, the appellant could have with reasonable diligence discovered before the trial and presented at trial all the evidence which was presented at the motion for new trial hearing regarding the State's so called "airplane theory." Furthermore, at the motion for new trial hearing the evidence presented in opposition to the State's theory was an attempt to contradict the testimony of the State's aviation expert. This Court has heretofore held that "newly discovered evidence which goes to impeachment purposes only is not sufficient to warrant a new trial." *Marlow v. City of Tulsa,* supra. We have not looked favorably on attempts to base a motion for new trial on evidence which merely tends to discredit or impeach the trial testimony of an expert in a technical matter. *Maxey v. State,* 526 P.2d 951 (Okl. Cr. 1974). Thus, the trial court did not abuse its discretion when it denied the motion for new trial as based on the attempts to discredit the State's airplane theory.

The second matter argued with regard to the motion for new trial centers around an affidavit sworn to by a convict, Thomas Upton, Jr., stating that Simmons had admitted that he was present at the Guest House Inn on the night of the murders. In view of the testimony presented which showed that Simmons had a facial but not a physical resemblance to the appellant, we find this evi-

dence is not significantly material and therefore not a basis for a new trial.

The third matter addressed by the motion for new trial was testimony by Harold Dean Behrens that he had never met the appellant, did not know him, and did not ask him to commit the murders. The record however shows that Behrens was never subpoenaed to testify at the trial on the appellant's behalf. Whether or not Behrens would have testified at trial is speculation which the trial court correctly avoided when it overruled the motion as based on these grounds. The appellant did not use due diligence when he failed to subpoena Behrens and thus elicit his testimony at the trial. Accordingly, the trial court did not abuse its discretion when it overruled the motion for new trial as based on Behrens' testimony.

The fourth matter on which appellant relied in his motion for new trial was testimony from a police detective whose investigation had revealed that one of the victims had been threatened by a person named Larry Nowell. The appellant was aware of the detective's involvement in the case. Not only was there a failure to exercise due diligence in obtaining this testimony at trial, the testimony at the hearing on the motion for new trial fails to demonstrate anything which was material to the appellant. Accordingly, the trial court did not abuse its discretion when it overruled the motion as based on this evidence.

The final matter addressed by appellant arises out of an affidavit by an attorney in Texas who had represented him when he was questioned in Texas by an Oklahoma detective. The attorney contradicted prior trial testimony when he stated that upon mention of Behrens' name the

appellant had not given any reaction which would have indicated a relationship with Behrens. This attempt to impeach prior trial testimony is not sufficient to warrant a new trial. *Marlow v. City of Tulsa,* supra.

In view of the evidence both separately and cumulatively presented in support of the first motion for new trial and in view of the applicable law, the trial court did not abuse its discretion when it overruled appellant's first motion for new trial.

Appellant's second motion for new trial is based upon the statement of Deana Burris, which was not made until eight months after the trial. This Court directed the district court to conduct an evidentiary hearing and to enter its findings of fact and conclusions of law.

Deana Burris had been a roommate of Ray Peters' ex-wife and she testified that she overheard Patsy Peters and her boyfriend, Lee Crowe, discuss killing Ray Peters in June of 1980. The three shared an apartment in South Carolina, and it was allegedly Patsy's desire to kill Ray Peters to keep him away from their children. Crowe allegedly promised to do the killing. Supposedly, Patsy had tried to lure Ray Peters to South Carolina, but he refused to come. About the time of the killings in question, Patsy and Crowe traveled to Oklahoma with Patsy's children to visit the childrens' grandparents.

Police investigators knew of Patsy's and Crowe's presence in Oklahoma at the time of the killings, but dropped Crowe as a suspect upon the eyewitnesses' identification of appellant and upon learning that Crowe had been in Madill, Oklahoma with Patsy's father on the evening of the shootings.

Appellant claims that had the jury heard this evidence, a reasonable doubt would have been created; that this evidence would have materially affected the verdict. However, there is evidence that both eyewitnesses viewed photographic arrays with Lee Crowe's and appellant's pictures. Each witness identified appellant, and failed to identify Crowe as being at the motel on the evening of the killings.

Ms. Burris was quite candid in discussing her career as a prostitute and of her dependence on certain narcotic drugs at the time she overheard the conversations in June, 1980. Her testimony went uncorroborated.

The district court made a thorough and exhaustive order in this matter. It found that the information regarding Crowe could have been discovered through the exercise of due diligence by requesting a list of suspects prior to trial, but the defense failed to do so. Also, the district court noted that the appellant failed to show under what theory of evidence law that the rumors, suspicions and innuendos concerning Crowe would have been admissible in the trial of the case. Further, the district court correctly found that the mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial, does not establish materiality. 22 O.S. 1981, § 952 (Seventh).

The district court did not abuse its discretion and properly disposed of appellant's motion.

Appellant in his ninth assignment of error asserts that the trial court erred by failing to advise him of his statutory right to personally argue against the sentence of death. However, he cites no authority for this contention

other than 21 O.S. 1981, § 701.10 and to say that he was thereby deprived of due process of law. Title 21 O.S. 1981, § 701.10 provides in pertinent part that, "the state and the defendant or his counsel shall be permitted to present argument for or against sentence of death." Both the appellant and his counsel were present in the courtroom when the judge gave the appellant's attorney an opportunity to make an argument during the penalty stage of the trial. Throughout the entire trial the appellant had elected to be represented by his privately retained attorney. It is clear that the appellant was aware of the opportunity given his attorney to argue on his behalf. In view of these circumstances, the trial court did not err by not instructing the appellant that he had the right to personally argue the issue of the penalty to the jury.

In his tenth assignment of error, appellant claims that the testimony given by Mary Chilton was hypnotically enhanced thereby denying him the right to confront the witness. Appellant argues that Chilton's testimony should not have been admitted into evidence. This issue however was not brought up during the trial, but was initially addressed in appellant's motion for new trial. By failing to object to the testimony at the time of its admission, appellant has waived review of the matter by this Court. See *Wells v. State,* 604 P.2d 144 (Okl. Cr. 1979). See also, *Mitchell v. State,* 549 P.2d 96 (Okl. Cr. 1976). But we do note that hypnosis of a witness does not *per se* create error. *See Johnson v. State,* 665 P.2d 815 (Okl. Cr. 1982). Further, no fundamental error appears in the record in this regard.

Appellant in his eleventh assignment of error asserts that 21 O.S. 1981, § 701.11 violates state and federal

due process requirements by failing to clearly place the burden of proof on the State. In his twelfth assignment of error, he argues that the trial court in its instructions failed to instruct on the State's burden of proof. Appellant's thirteenth assignment of error maintains that 21 O.S. 1981, § 701.11 fails to prescribe the standard of proof to be met. Appellant claims in his fourteenth assignment of error that the trial court erred by failing to instruct the jury on the standard of proof the State was required to meet in the penalty stage of the trial.

In the second stage of the trial the jury was instructed in part as follows:

> You are instructed that in the event you unanimously find that one or more of these aggravating circumstances existed beyond a reasonable doubt, then you would be authorized to consider imposing a sentence of death.
>
> If you do not unanimously find beyond a reasonable doubt one or more of the statutory aggravating circumstances existed, then you would not be authorized to consider the penalty of death. In that event the sentence would be imprisonment for life.
>
> If you do unanimously find one or more of these aggravating circumstances existed beyond a reasonable doubt and you further find that such aggravating circumstance or circumstances is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. In that event the sentence would be imprisonment for life.

Prior to the issuance of this instruction, the appellant did not object to the instructions, did not offer any instructions of his own, and failed to challenge the validity of 21 O.S. 1981, § 701.11. In view of his failures in this regard and after a review of the record on appeal

these issues have been waived and are not properly before us. *Jetton v. State,* 632 P.2d 432 (Okl. Cr. 1981). However, this Court has previously held that this statute does not unconstitutionally shift the burden of proof to the defendant. *Ake v. State,* 663 P.2d 1 (Okl. Cr. 1983); *Parks v. State,* 651 P.2d 686 (Okl. Cr. 1982), *cert. denied,* 103 S.Ct. 800. This Court has consistently held that the trial judge's exercise of discretion in instructing the jury will not be interfered with as long as the instructions considered as a whole fairly and accurately state applicable law. *Green v. State,* 611 P.2d 262 (Okl. Cr. 1980). A review of the record reveals no abuse of discretion.

In his last assignment of error, appellant argues that he was denied due process of law because he was held to answer for a capital crime without an indictment by a grand jury. In his brief, appellant recognizes that the United States Supreme Court addressed the issue of whether or not the right to indictment afforded in the Fifth Amendment to the United States Constitution should be extended to state prosecutions in *Hurtado v. California,* 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed.2d 232 (1884), and ruled that the right to be indicted by a state grand jury was not encompassed within the meaning of "due process of law" contained in the Fourteenth Amendment. Appellant, however, asserts that the Supreme Court's holding in *Hurtado v. California,* supra, should no longer be followed.

We have heretofore held that a prosecution in Oklahoma may be by either indictment or information. *Towning v. State,* 521 P.2d 415 (Okl. Cr. 1974). This view has further been recognized by the federal Court of Appeals for the Tenth Circuit. *Freeman v. Page,* 443

F.2d 493 (10th Cir. 1971). Accordingly, this assignment of error is without merit.

The jury recommended that appellant receive the death penalty for his part in these crimes. The evidence of the cold and calculated executions supports the jury's finding of three aggravating circumstances. First, it was found by them that the murders were especially heinous, atrocious or cruel. Also, that appellant created a great risk of death to more than one person. Finally, the jury found that appellant killed for the purpose of avoiding or preventing a lawful arrest or prosecution. These findings are fully warranted under the evidence.

As required by 21 O.S. 1981, § 701.13(B) this Court makes the following findings with regard to sentences of death which have been imposed by the jury. Accordingly, we find that: (1) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the jury's finding of statutory aggravating circumstances as enumerated in 21 O.S. 1981, § 701.12; (3) and the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases after considering the crime and the defendant.[1] 21 O.S. 1981, § 701.13(c)(3).

---

1. *Robison v. State*, 677 P.2d 1080 (Okl. Cr. 1984); *Dutton v. State*, 674 P.2d 1134 (Okl. Cr. 1984), *cert. denied*, _____U.S._____, 104 S.Ct. 3548; *Stafford v. State*, 669 P.2d 285 (Okl. Cr. 1983), *vacated on other grounds*, _____U.S._____, 104 S.Ct. 2652 (1984); *Stafford v. State*, 665 P.2d 1205 (Okl. Cr. 1983), *vacated on other grounds*, _____U.S._____, 104 S.Ct. 2652 (1984); *Davis v. State*, 665 P.2d 1186 (Okl. Cr. 1983), *cert. denied*, _____U.S._____, 104 S.Ct. 203; *Parks v. State*, 651 P.2d 686 (Okl. Cr. 1982), *cert. denied*, _____U.S._____, 103 S.Ct. 800 (1983); *Jones v. State*, 648 P.2d 1251 (Okl. Cr. 1983), *cert. denied*, _____U.S._____, 103 S.Ct. 799; *Hays v. State*, 617 P.2d 223 (Okl Cr. 1980); and, *Chaney v. State*, 612 P.2d 269 (Okl. Cr. 1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1731 (1981).

For the reasons herein stated, the judgments and sentences appealed from should be, and the same are hereby AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT
OF OKLAHOMA COUNTY, OKLAHOMA
THE HONORABLE RAYMOND NAIFEH,
DISTRICT JUDGE

CLIFFORD HENRY BOWEN, appellant, was convicted of three (3) counts of Murder in the First Degree, in the District Court of Oklahoma County, Case No. CRF-80-3397. He was sentenced to death on each count, and he appeals. AFFIRMED.

HAYNES & FULLENWEIDER
HOUSTON, TEXAS

GOTCHER, GOTCHER &
TAYLOR
McALESTER, OKLAHOMA

Attorneys for Appellant

MICHAEL C. TURPEN
ATTORNEY GENERAL

ROBERT W. COLE
ASSISTANT ATTORNEY
GENERAL
STATE OF OKLAHOMA
OKLAHOMA CITY,
OKLAHOMA

Attorneys for Appellee

OPINION BY BUSSEY, P.J.
PARKS, J., CONCURS IN RESULTS
BRETT, J., CONCURS IN RESULTS

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. F-81-315

CLIFFORD HENRY BOWEN
Appellant,

v.

THE STATE OF OKLAHOMA,
Appellee.

(Filed March 8, 1985)

ORDER DENYING MOTION FOR REHEARING

NOW on this 8th day of March, 1985, the Court having considered the appellant's Motion for Rehearing and the arguments and authorities in support thereof, and being fully advised in the premises, finds that the motion should be and the same hereby is DENIED.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 8th day of March, 1985.

/s/ HEZ J. BUSSEY
Hez J. Bussey, Presiding Judge

/s/ ED PARKS
Ed Parks, Judge

/s/ TOM BRETT
Tom Brett, Judge

ATTEST:

/s/ JARVIS PATTERSON
Clerk

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. F-81-315

CLIFFORD HENRY BOWEN,
Appellant,

v.

THE STATE OF OKLAHOMA,
Appellee.

(Filed March 15, 1985)

ORDER SETTING EXECUTION DATE

On March 12, 1985, the Attorney General filed a motion in this Court requesting that a new execution date be set for the above appellant. On November 30, 1984, appellant's conviction in Case No. CRF-80-3397, in the District Court of Oklahoma County was affirmed by decision of this Court. Furthermore, on March 8, 1985, appellant's petition for rehearing was denied. NOW THEREFORE, insofar as there is nothing further pending in this Court concerning appellant's conviction, this Court finds that a new execution date should be set in accordance with the jury's verdict finding appellant guilty of Murder in the First Degree, in which the death penalty was assessed.

IT IS THEREFORE THE ORDER OF THIS COURT, that the execution date for Clifford Henry Bowen, who was convicted of First Degree Murder, in Oklahoma County District Court, Case No. CRF-80-

3397, in which the death penalty was assessed shall be set for the 17th day of June, 1985.

IT IS SO ORDERED.

WITNESS OUR HANDS AND SEAL OF THIS COURT this 15th day of March, 1985.

/s/ ED PARKS
Ed Parks, Presiding Judge

/s/ TOM BRETT
Tom Brett, Judge

/s/ HEZ J. BUSSEY
Hez J. Bussey, Judge

ATTEST:

/s/ JARVIS PATTERSON
(Clerk)

JUN 27 PAGE 3

Supreme Court, U.S.
FILED
JUN 7 1985
ALEXANDER L. STEVAS
CLERK

(3)

No. 84-1741

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CLIFFORD HENRY BOWEN,
Petitioner,
vs.
STATE OF OKLAHOMA,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

ROBERT A. NANCE *
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, FEDERAL DIVISION

ROBERT W. COLE
ASSISTANT ATTORNEY GENERAL

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT

* Counsel of Record

June, 1985

BEST AVAILABLE COPY

Happ

No. 84-1741

IN THE
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DEPUTY CHIEF, FEDERAL DIVISION

ROBERT W. COLE
ASSISTANT ATTORNEY GENERAL

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT

* Counsel of Record

June, 1985

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment requires the State to reveal to the Defendant investigatory leads which are deadends, even in the absence of a request by the Defendant.

2. Whether an experienced criminal defense lawyer calling twelve alibi witnesses in the first stage of a capital murder case, but calling no witnesses nor making any argument in the sentencing stage deprived the Defendant of effective assistance of counsel.

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No. 84-1741

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CLIFFORD HENRY BOWEN,
Petitioner,
vs.
STATE OF OKLAHOMA,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Respondent, State of Oklahoma, respectfully presents this as its Response in Opposition to the Petition for Writ of Certiorari filed herein.

OPINION AND JUDGMENT DELIVERED BELOW

The Oklahoma Court of Criminal Appeals' opinion in Bowen v. State of Oklahoma, No. F-81-315, was rendered on November 30, 1984. The Oklahoma Court

of Criminal Appeals denied the Petitioner's Motion for Rehearing on March 8, 1985.

JURISDICTION

The Petitioner invokes jurisdiction of this Court under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the United States Constitution are applicable to this case.

The Sixth Amendment to the United States Constitution provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment, § 1, to the United States Constitution provides as follows:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Procedural History

Clifford Henry Bowen, hereinafter Defendant, was convicted on March 13, 1981, after jury trial in the District Court of Oklahoma County, State of Oklahoma, in that court's Case No. CRF-80-3397 of three counts of First Degree Murder under 21 O.S.Supp.1980, § 701.7. The jury sentenced the Defendant to die

in each count. The trial court overruled the Defendant's Motion for New Trial, and Amended Motion for New Trial on May 7, 1981, and judgment and sentence were imposed on that date.

The Defendant perfected his direct appeal to the Oklahoma Court of Criminal Appeals, in that court's Case No. F-81-315, and that court remanded the case to the trial court for an evidentiary hearing on the Defendant's second Motion for New Trial. The trial judge, the Honorable Raymond Naifeh, conducted an evidentiary hearing on that motion on September 29-30, 1983, and submitted Findings of Fact and Conclusions of Law on October 26, 1983. Thereafter, the Defendant filed a supplemental appellate brief in the Court of Criminal Appeals.

B. Statement of the Facts

On July 5, 1980, during the evening hours, a group of guests at the Guest

House Inn assembled by the pool. Mary Chilton, a night office clerk at the motel, worked until 10:00 p.m., and then joined her friends at pool side (Tr. 289). Later that evening, she notice a man who was not a guest at the motel (Tr. 292), standing at the concession stand, leaning upon the candy machine (Tr. 311). It was part of her duties to keep intruders off the premises (Tr. 292).

Harold Behrens, co-defendant of the Petitioner and one of the individuals at pool side, placed his hand upon the shoulder of Ray Peters, who is one of the decedents, said "see you tomorrow," and left via the concession area (Tr. 294). Such physical contact upon parting company was not Behrens' normal practice (Tr. 422). Then, Mary Chilton also left by way of the concession area.

This area is very well lit by floodlights from the roofline (Tr. 234, 312), lights on the ceiling of the vending machine area (Tr. 232, 298-99), and light from the vending machines themselves (Tr. 237). All of the above-mentioned lights were on (Tr. 298). Mary Chilton walked within three feet of the man and looked right at him (Tr. 295). She had no trouble seeing the Defendant's face (Tr. 299). In addition, Mary Chilton had a good view of the Defendant when she was sitting at the pool side (Tr. 308). She gave an accurate description of the Defendant's height, weight, and physical stature (Tr. 307). The Defendant had a pale complexion (Tr. 317). This was substantiated by others (Tr. 355). Mary Chilton "memorized" the Defendant's face (Tr. 13), and there was no doubt in her mind that the Defendant

was the man that she saw at the concession stand (Tr. 293, 295, 326).

Carrie Pitchford, her husband, and her daughter also were pool side (Tr. 331). The family left the pool area at 1:30 a.m. and went to their room (Tr. 332). While her husband and her daughter went to bed immediately, Carrie did not. She thought about going back out and twice looked out the window to see if any of the women were still by the pool (Tr. 333). She looked out a third time and saw a large, pale complected man, subsequently identified as the Defendant, leaning upon a machine at the concession stand (Tr. 335). The Defendant looked straight up at Carrie Pitchford so that she could see his full face (Tr. 336). She viewed the Defendant for "one full minute or more." (Tr. 354.) The lighting was very good; it was similar to a stage (Tr. 339, 349). Carrie

Pitchford had not been drinking that evening (Tr. 343). She had no trouble seeing the Defendant's features (Tr. 339), and there was no doubt in her mind that the Defendant was the man whom she had seen that evening (Tr. 336). As soon as Carrie laid down, she heard gunfire, jumped up, and saw one of the decedents slump in his pool side chair (Tr. 337).

The manager of the motel noticed an individual in the concession area (Tr. 359). The description of the individual and his attire were substantially the same as the description given by other witnesses. The manager also saw a car with womeone sitting in it (Tr. 360). The manager and his wife heard "firecrackers" and then noticed an individual, with a red cap in his hand, shooting a gun (Tr. 361). The manager summoned the police (Tr. 363). As this was

being done, a car exited the motel parking lot at a high rate of speed (Tr. 364).

When the police arrived, they found three men sitting at a pool side table, all of whom had at least two gunshot wounds (Tr. 209). Six .45 caliber spent casings were found, as well as one lead projectile (Tr. 210). At 2:30 a.m., photographs of the scene were taken, and the lighting of the premises, with the assistance of two flashlights, was adequate with which to take photographs (Tr. 220). There were floodlights upon the roofline (Tr. 234), lighting upon the ceiling of the vending machine area (Tr. 232), lighting from the vending machines themselves (Tr.237), and lighting from the motel sign (Tr. 237). The lighting was so good that the photographer stated that "I could load my

camera, read my settings, read the tape measure" (Tr. 235).

On July 6, an autopsy was performed upon all three bodies. The death of Ray Peters was caused by two gunshot wounds to the head which resulted in extensive lacerations and a brain hemorrage (Tr. 251). Loose gunpowder was found upon the body; therefore, the gun was discharged within two feet of the body (Tr. 252). Lawrence Evans had three gunshot wounds inflicted by hollow point bullets (Tr. 256-57). The cause of death was the wounds (Tr. 260). Marvin Nowlin had two gunshot wounds which caused his death (Tr. 268). Pathological symptoms of drug use were found in Peters and Nowlin (Tr. 271). All of the cartridges were fired from the same gun (Tr. 279). Hollow point bullets were used to caused greater damage upon impact (Tr. 283).

In an effort to connect Harold Behrens, a co-defendant, with the Defendant and to provide a motive, the testimony of two additional witnesses was introduced. In 1975, David McBride supervised the organized crime detail of the Oklahoma City Police Department. Harold Behrens, an ex-police officer, was assigned to participate in the surveillance of Jerry Ray James and the Defendant (Tr. 405). During the later stages of the investigation, Harold Behrens resigned from the police department (Tr. 408). Immediately after the resignation, Jerry James and the Defendant disappeared from Oklahoma City (Tr. 409).

Jack Zumwalt testified that he lived with and was lover of Harold Behrens (Tr. 421). Harold Behrens made his living selling drugs and supported Jack Zumwalt while they lived together (Tr.

421). It was not the custom of Harold Behrens to have physical contact with people upon parting their company, as he had done on the early morning hours of July 6 (Tr. 422). Ray Peters worked for Harold Behrens as a drug dealer (Tr. 423). In June, Ray Peters had been arrested in Pauls Valley, Oklahoma, for driving under the influence and drug charges. Harold Behrens was afraid that Ray Peters would become an informant (Tr. 424). After Jack Zumwalt heard of Ray Peters' death, he asked Harold Behrens why Ray Peters and not Jim Powell, another drug seller. Harold Behrens replied, "because we need Jim." (Tr. 425.)

An arrest warrant was issued for the Defendant, and Officer Cook went to Tyler, Texas, to serve it (Tr. 432). The Defendant was advised of his rights (Tr. 433). The Defendant was questioned

about a number of people, but when he was asked if he knew Harold Behrens, he glanced down and said no (Tr. 436).

The Defendant presented an alibi defense. He presented numerous witnesses who claimed that on the evening in question, the Defendant was at a rodeo in Tyler, Texas. The Defendant took the stand in his own behalf and admitted that he had two prior felony convictions (Tr. 546). He claimed that on July 5, he was not in Oklahoma City (Tr. 549). He claimed that he has made his living since 1971 by gambling and supplemented that income through the purchase and sale of jewelry and real estate (Tr. 548, 522). The Defendant stated that he had psoriasis and was told to get as much sun as possible to remedy the malady, and consequently, that he had a suntan (Tr. 549). The Defendant further

alleged that he knew nothing about guns (Tr. 552).

Officer Harrison was called to testify for the defense. The officer stated that Mary Chilton initially identified a photograph of another, namely William Simmons, as the assailant. The officer attempted to secure an arrest warrant for Simmons. Upon cross-examination of Officer Harrison, he revealed that Mary Chilton never made a positive identification of Simmons as the assailant (Tr. 654), and that at an in-person lineup, Mary Chilton said that Simmons looked like the man but definitely was not him.

The State produced rebuttal witnesses. The arresting officer stated that upon arrest the Defendant was light-complected and did not have a tan (Tr. 575-76). This was confirmed by other witnesses (Tr. 580, 583). It was

also revealed that there is an airstrip within four minutes of the rodeo where the Defendant allegedly was (Tr. 577), and that a flight from Tyler, Texas, to the Oklahoma City downtown airpark would only take between 30-35 minutes (Tr. 581). Records of in and out flights are not kept, and less than one tank of gas would be required for the round trip. It is only 13 minutes from the Guest House Inn to the downtown airpark (Tr. 584), so that the entire trip would take less than one hour.

Williams Simmons testified. He is only 5'8" and 180 pounds, which is a much smaller frame than the one on the assailant (Tr. 593). To rebut the presumption raised by the Defendant that he knew nothing about guns, it was revealed that on July 7, 1977, in Plano, Texas, a search warrant was procured for a home in which the Defendant resided along

with his wife and another (Tr. 587). The Defendant was arrested and a search uncovered an arsenal of weapons (Tr. 587-88).

The Defendant was found guilty of three counts of Murder in the First Degree. After the second stage of trial, the jury determined that three aggravating circumstances existed and set the punishment for each count at death.

SUMMARY OF THE ARGUMENT

Petitioner was not denied due process of law in his trial for murder because the prosecution failed to disclose information of an investigatory deadend. At one point, police officer investigated a man named Lee Crowe, who was similar in stature to the Defendant. However, two eyewitnesses identified the Defendant rather than Lee Crowe as the

man present at the scene of the shootings. In addition, Crowe had an alibi. Further, Crowe's fingerprints were not found near the scene of the crime, nor were .45 caliber shell casings found at the crime matched with those which Crowe had fired as a police officer at a firing range in South Carolina. The Defendant made no request for exculpatory evidence prior to trial. The fact that police at one point inquired regarding Lee Crowe but later abandoned the inquiry when it became clear witnesses identified the Defendant rather than Crowe in no way creates a reasonable doubt as to Defendant's guilt, and, therefore, that evidence is not material in the constitutional sense.

The Defendant's trial counsel was an experienced criminal defense lawyer with 30 years' experienced who had previously been a prosecuting attorney. In the

defense case, counsel presented 12 alibi witnesses, attempting to show that the Defendant was not in Oklahoma City at the time of the murders. Instead, counsel tried to show that Defendant was in Tyler, Texas, at or near the time of the shootings. When the jury returned a guilty verdict for the offenses of gunning down three men in cold blood while they sat around a motel swimming pool, it became clear that the alibi defense did not persuade the jury. In light of that failure to persuade the jury, counsel made the tactical decision to do nothing in the sentencing phase. Counsel had successfully used this tactic in another case. By doing so, counsel hoped to secure a modification to life imprisonment should his client be sentenced to die. In any event, the Defendant did not have genuine mitigating evidence to offer. Even at this late

date, no such mitigating evidence is offered to this Court.

WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

I. THE REJECTED INVESTIGATORY LEAD COMPLAINED OF BY THE DEFENDANT WOULD NOT HAVE CREATED A REASONABLE DOUBT REGARDING HIS GUILT AND NEED NOT HAVE BEEN PROVIDED BY THE PROSECUTION IN THE ABSENCE OF A REQUEST.

The Defendant concedes that this is a case in which no request for exculpatory material was made by his trial counsel. Unless the failure of the prosecution to provide the information now complained of deprived the Defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside. United States v. Agurs, 427 U.S. 97, 108 (1976). Evaluating the supposedly withheld evidence in the context of the entire record, the omitted evidence is only material if it created a reasonable doubt that did not

otherwise exist. Necessarily, only the withholding of material evidence is constitutional error. Agurs, supra, 427 U.S. at 112. See, Hall v. State, 650 P.2d 893, 897 (Okl.Cr. 1982) (where no request for exculpatory evidence likelihood suppressed evidence would result in acquittal must be more than a reasonable probability).

The Lee Crowe lead relied upon by the Defendant was a false lead initially checked by police but later discarded when eyewitnesses at the scene identified the Defendant as the man who had laid in wait prior to executing the victims. Lee Crowe was never identified by any witness as being anywhere near the motel's swimming pool at which the three victims were shot to death. Quite the contrary, two witnesses positively identified the Defendant as the man who waited near the motel concession area

for others to leave the pool side party immediately before the three men were shot to death with hollow-point .45 caliber bullets. Neither did the .45 caliber automatic shell casings found at the scene of the triple murder match the .45 caliber shell casing Crowe had expended on the police firing range in South Carolina. See attached Affidavit of Detectives Cook and Horn, Appendix A. Finally, police secured a fingerprint card for Lee Crowe, and compared it with the fingerprints found at the crime scene with negative results. See Appendix A.

This Court's case of Moore v. Illinois, 408 U.S. 786 (1972), presents an almost identical factual situation. In Moore, two eyewitnesses identified the defendant as the man who shot a bartender following an altercation in a Chicago area bar. In addition, a bartender in

another bar identified a man known to him as "Slick" as having made statements that he had shot a bartender in Lansing, Illinois. It was reliably determined that the defendant Moore was both the shooter and the man who admitted the shooting, but that he was not "Slick." The police assigned a lieutenant to find "Slick" without success. In that case, this Court stated:

> "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work in a case. Here, the elusive 'Slick' was an early lead the police abandoned when eyewitnesses to the killing and witnesses to Moore's presence at the Ponderosa were found. . . ." Moore v. Illinois, 408 U.S. at 795.

In Moore, the Court concluded that in light of all of the evidence, the witnesses' misidentification of the defendant Moore as "Slick" was not material to the issue of guilt. Id., 408 U.S. at 797. The Court came to this conclusion

even considering the fact that Moore had raised an alibi defense that he was working as a waiter in a country club about 50 miles from the scene of the shooting at the time the murder occurred. Id., 408 U.S. at 790-91.

In light of Agurs and Moore, it is clear that the early investigatory lead of Lee Crowe was not material to the Defendant's guilt or innocence. It is clear from eyewitnesses to the scene that the Defendant, not Crowe, was the shooter. Both witnesses Chilton and Pitchford selected Defendant positively from photo arrays also containing Lee Crowe. Both specifically ruled out Crowe. It is also clear that the Defendant was tied to Harold Behrens, who was present at the scene and who uncharacteristically pointed out Ray Peters by placing his hand on his shoulder to indicate to the shooter who his victim

was. The fact that the police early on investigated, but rejected, Lee Crowe as a suspect creates no reasonable doubt regarding the Defendant's guilt. The Constitution does not require disclosure of improper or trivial information which "might" affect the jury's deliberation. It only requires disclosure of evidence which might give rise to a legitimate doubt on the issue of guilt. United States v. Agurs, 427 U.S. at 108-09.

II. DEFENDANT'S ATTORNEY GAVE HIM CONSTITUTIONALLY EFFECTIVE ASSISTANCE AT TRIAL.

The Defendant now claims that he was denied constitutionally effective counsel by his trial attorney's failure to file certain motions and to challenge the evidence of one eyewitness. He further complains about counsel's failure to call the co-defendant, Harold Behrens, to testify that Behrens did not

know him and did not hire him for the assassination-style killing. He further challenges counsel's failure to more effectively rebut the prosecution's "airplane theory" as well as failure to request certain instructions and failure and object to certain comments of the prosecutor in closing argument. The Defendant further challenges his counsel's failure to submit evidence or argument in the sentencing phase of the trial.

As an initial matter, the Constitution does not require criminal defense counsel to pursue all plausible lines of defense. United States v. Glick, 710 F.2d 639, 644 (10th Cir. 1983). Where the Defendant's planned alibi defense has failed, he is, in hindsight, attempting to try his attorney by elevating everything that appellate counsel might have done differently to the level of a constitutional failure. This Court

condemned the "distorting effects of hindsight" in Strickland v. Washington, ___ U.S. ___, 104 S. Ct. ___, 80 L. Ed. 2d 674, 694 (1984), in stating that counsel's adequacy must be evaluated based upon counsel's perspective at the time. The Court also noted that there are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. Id., 80 L. Ed. 2d at 695. Further, the Court recognized that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id., 80 L. Ed. 2d at 695.

In discussing the reliance upon reasonable professional judgment, this Court in Strickland stated:

> ". . . As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . ." Id., 80 L. Ed. 2d at 695.

As in Strickland, many of the decisions of counsel in the present case were strategic choices of an experienced criminal defense lawyer made in the exercise of reasonable professional judgment.

For instance, counsel could have challenged the fact that eyewitness Mary Chilton had undergone hypnosis prior to trial. However, Mary Chilton had given identical testimony before hypnosis, and a harsh attack on Chilton would have blunted counsel's attempts to portray

the eyewitnesses as honest, but mistaken, witnesses. Further, Carrie Pitchford, the other eyewitness, independently corroborated Mary Chilton without herself being hypnotized. It is only speculation to say what co-defendant Harold Behrens would have testified had he been called. Behrens was convicted and sentenced to life for his role in the Guest House Inn murders. The decision not to challenge certain statements of the prosecutors in closing arguments were doubtless strategic as well. Particularly, where the prosecutor's portrayal of the Defendant as a professional hit man was supported by the evidence that he had lain in wait until most potential witnesses had left the pool side party and he could murder the three remaining men with ammunition available in his .45 caliber automatic pistol. It was entirely reasonable from the facts

demonstrated at trial to say that the Defendant, who gunned down Ray Peters and two potential witnesses, in cold blood at 2:00 a.m., was conducting a professional "hit." Extended argument over the point could only serve to reinforce the idea in the mind of the jury. Further, trial counsel had presented a dozen alibi witnesses, attempting to place the Defendant in Texas at the time of the triple murder in Oklahoma City. Unnecessary argument over prosecutor's closing remarks could only serve to detract from the force of the alibi testimony. These matters were clearly strategic made by trial counsel with over 30 years' experience and, as such, are "virtually unchallengeable." Strickland v. Washington, 80 L. Ed. 2d at 695.

The Defendant fails on the second prong of the test announced by the Court

in Strickland v. Washington, supra. In that case, this Court stated:

> ". . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., 80 L. Ed. 2d at 698.

The only prejudice the Defendant now identifies to help the Court make the determination necessary under Strickland is found on page 24 of the Petition, where the Defendant claims as prejudice that he was an innocent man who was 300 miles away from the scene of the crime, but yet was convicted. However, this "prejudice" is merely a reassertion of his alibi defense. The State presented its eyewitnesses placing the Defendant at the scene of the triple murder, while the Defendant presented alibi witnesses attempting to place him in Texas at the time of the murders in Oklahoma City.

It cannot be said that the confidence in the outcome of a criminal trial is in doubt where a jury must choose, as a matter of fact and evidence, between two competing and inconsistent accounts of the truth. To permit such jury decisions to constitute "prejudice" would emasculate not only Strickland, but also the jury system.

Even given Defendant's asserted errors of his trial counsel, there is no reasonable possibility of a different result in the guilt phase of his trial. None of the asserted errors would have changed the balance which caused the jury to credit the eyewitnesses' placing him at the scene of the murder rather than the alibi witnesses attempting to place him in Texas. Strickland makes clear that the point of the adversarial system is to produce a just result. Strickland v. Washington, 80 L. Ed. 2d

at 692-93. The point of the adversarial system is not to contention for the sake of contention, but instead is to produce a just result through vigorous but fair advocacy on both sides. In this sense, Defendant's trial counsel was more than adequate and the result was just.

The Defendant departs from the teachings of Strickland v. Washington, supra, in his criticism of trial counsel's failure to put on evidence or make argument during the punishment phase of the trial. Strickland teaches us that the adequacy of counsel's performance must be evaluated from conduct from the counsel's perspective at the time, giving that conduct a strong presumption that it falls within the wide range of reasonable professional assistance. Id., 80 L. Ed. 2d at 694-95. From counsel's perspective at the time of trial, it became clear when the jury returned a

verdict of guilt that the alibi defense had failed. This meant that the jury either disbelieved the alibi witnesses or believed the State's "airplane theory." If further means that the jury found the Defendant guilty, beyond a reasonable doubt, of laying in wait to shoot three men to death with .45 caliber hollow-point bullets. From counsel's perspective at that point, he made a strategic decision almost brilliant in its simplicity.

What appears at first to be a troubling failure of counsel is, in fact, a cunning tactical decision. Given the fact the jury returned a guilty verdict on three counts of First Degree Murder, it was almost sure from the underlying circumstances that they would return some, if not all, of the aggravating circumstances sought by the State. These aggravating circumstances were

that the Defendant created a risk of death to more than one person (Tr. 694-95), that the murder was committed for purposes of avoiding or preventing lawful arrest or prosecution, that the murder was especially heinous, atrocious or cruel (Tr. 695), or that there was a probability the Defendant would commit criminal acts of violence and would constitute a continuing threat to society (Tr. 696). At the same time, none of the standard mitigating circumstances applied to the Defendant. See Appendix B, copy of trial court's instructions on minimum mitigating circumstances. Even now, in the Petition for Writ of Certiorari, the Defendant offers the Court no hint or clue of what evidence in mitigation would have been appropriate. Thus, it becomes clear that the Defendant had, and continues to have, no mitigating evidence to offer. The murder involved

was one of deliberate assassination of three men, shot down in cold blood.

This Court noted in United States v. Chronic, ___ U.S. ___, 104 S. Ct. ___, 80 L. Ed. 2d 657 (1984), the following:

> "Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. . . ." Id., 80 L. Ed. 2d at 666, n. 19.

First, counsel had no duty to do what was impossible or unethical in manufacturing nonexistent mitigating evidence. Further, if counsel did nothing and yet his client was sentenced to life, his client would have been well served by counsel's decision not to attempt the useless charade of presenting mitigating evidence. On the other hand, if, as actually happened, his client was sentenced to death, his strategic decision

to do nothing might appear to an appellate court to be ineffective assistance and might result in modification by the Court of Criminal Appeals from the death penalty to life imprisonment. Such a result would be highly likely in light of the law in Oklahoma prejudice in the second stage of a bifurcated proceeding can only result in modification, if necessary, but not reversal. Irvin v. State, 617 P.2d 588, 599 (Okl.Cr. 1980).

In the case at bar, Mr. Burger has been engaged in the practice of law for over 30 years. His practice consists largely of cases in the field of criminal law. He also has been employed as a county prosecutor. He has tried in excess of three dozen murder cases. He is well seasoned in the area of criminal law and has had considerable experience with cases similar to this one. The failure to present a case during the

second stage of trial is a trial strategy which Mr. Burger has used quite successfully in the past. In the case of Daugherty v. State, 640 P.2d 558 (Okl. Cr. 1982), Mr. Burger was the trial counsel. At trial, the defendant was convicted of murder in the first degree. During the penalty stage, the defendant was sentenced to life imprisonment despite the fact that no opening statement was made, no evidence was presented, and only a perfunctory closing argument was made. See Appendix C, copy of counsel's closing argument in Daugherty. It is obvious that this is a trial strategy which has been used successfully by Mr. Burger in the past. With nothing of substance to offer in mitigation, trial counsel relied on his proven strategy.

Thus, while Mr. Burger had nothing in mitigation to offer during the sentencing phase, he elected to do nothing

in the hope that his inaction might save his client's life on appeal where no effective action could save it at trial. However, even before this Court, the Defendant is unable to show any prejudice in the sense of a reasonable probability of different result had his trial counsel made any other tactical decision. Instead, on page 28 of the Petition, the Defendant cites to Justice Brennan's footnote number 2 in Strickland for the proposition that some denial of counsel constitutes error without any showing of prejudice. However, this attempt wrenches Justice Brennan's thinking out of context, particularly in the case where, as here, trial counsel's decision was a tactical one based upon the absence of mitigating evidence and the hope of modification by the Court of Criminal Appeals. To permit reversal because of such deliberate tactics of

trial counsel would be to ignore Strickland's requirement that the defendant show genuine prejudice as a result of his counsel's activities.

In light of the facts and circumstances at the time, Defendant's counsel had nothing in mitigation to offer and rested his approach, by strategic decision, in a hope of modification by the Court of Criminal Appeals, or this Court, if the jury returned the death penalty. In a sense, where defense counsel had nothing of substance to offer, it is perhaps the most competent thing he could have done under the circumstances. The Defendant herein has not rebutted the strong presumption of adequate assistance and exercise of reasonable professional judgment, nor has he met the Strickland burden of showing a likely possibility the result would have been different under any conceivable course his trial counsel could have

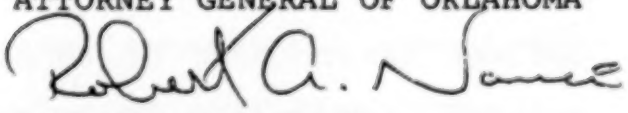
taken. Therefore, his counsel was clearly adequate within the tests set out by this Court in Strickland v. Washington.

CONCLUSION

For reasons set out above, the State of Oklahoma respectfully requests this Court to deny the writ of certiorari herein.

Respectfully submitted,

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA



ROBERT A. NANCE *
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, FEDERAL DIVISION

ROBERT W. COLE
ASSISTANT ATTORNEY GENERAL

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT

* Counsel of Record

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NO. 84-1741

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CLIFFORD HENRY BOWEN,
Petitioner

v.

STATE OF OKLAHOMA,
Respondent

On Petition For A Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma

THE PETITIONER'S REPLY TO THE RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JACK B. ZIMMERMANN
JIM E. LAVINE
LAW OFFICES OF
JACK B. ZIMMERMANN
(On Appeal Only)
Five Post Oak Park, Suite 1130
Houston, Texas 77027
Tele: (713) 552-0300
Attorneys for Petitioner,
Clifford Henry Bowen

BEST AVAILABLE COPY

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THE PETITIONER'S REPLY TO THE RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner is compelled to reply to arguments raised in the Respondent's Response In Opposition To Petition For A Writ Of Certiorari (hereafter referred to as

Response) that are premised on "facts" where no facts exist in the record. On the issue of ineffective assistance of counsel, Respondent submits on page 33 of its *Response* that "What appears at first to be a troubling failure of counsel is, in fact, a cunning tactical decision." Respondent then attempts to construct this argument with a discourse on trial defense counsel's alleged experience, thought processes, tactics, and accomplishments, and argues them as proven facts. (*Response,* pages 17, 18, 29, 36, 37, 38, Appendix C). It is significant that these "statements of facts" contain no reference to the record of any of the evidentiary proceedings below. Neither trial defense counsel nor anyone else has ever testified in this record concerning the matters that purport to support Respondent's position. These matters are completely dehors the record and do not comport with the requirements of Supreme Court Rules 22.1 and 34.1(g); therefore, the Petitioner respectfully submits that they should not be considered by this Court in its disposition of this case.

No matter how strong, tall or solid a structure may appear, if the foundation is weak or faulty and crumbles, the entire structure crumbles and falls. Respondent's argument as to ineffective assistance of counsel crumbles and falls as well. Remove the non-existent factual foundation and the "troubling failure of counsel" is revealed to be and is clearly highlighted as the basis for a constitutionally infirm judgment of the Court of Criminal Appeals of the State of Oklahoma.

CONCLUSION

For these reasons and for the reasons stated in the original Petition, a Writ of Certiorari should issue to

review the judgment and opinion of the Court of Criminal Appeals of the State of Oklahoma.

Respectfully submitted,

LAW OFFICES OF
JACK B. ZIMMERMANN

By: _____
JACK B. ZIMMERMANN

By: _____
JIM E. LAVINE

Five Post Oak Park, Suite 1130
Houston, Texas 77027
Tele: (713) 552-0300

Attorneys for Petitioner,
Clifford Henry Bowen

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within and foregoing Petitioner's Reply To The Response In Opposition To Petition For A Writ Of Certiorari by mailing three copies thereof to counsel of record in an envelope properly stamped and addressed as follows:

Michael C. Turpen
Attorney General of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105

_____